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Fair Comment — The Extent Of The Public Interest Element

*Afro-American Publishing Co. v. Jaffe*

Mr. Jaffe owned a pharmacy in a predominately Negro neighborhood in Washington, D.C., and had a subscription to sell a number of copies each week of the Washington Afro-American, a newspaper primarily serving the Washington Negro community. Because he felt that the newspaper was spreading racial hatred and distrust, he can-
celled his subscription. While he refused to discuss the subject on the telephone, he did express these views to the Afro’s editor when the latter visited him to inquire as to his reasons for the cancellation. In response, the defendant published a picture of the plaintiff’s pharmacy on its front page with the caption, “The picture below is the scene of ‘One Man’s War Against the Afro’.” Accompanying the picture was an article by the editor stating that the plaintiff’s conduct made him “appear to be a bigot” and that he was “attempting to tell colored people just how fast and hard they should run in their race toward racial equality.” Plaintiff Jaffe brought an action for libel, and the district court, sitting without a jury, found the publication to be libelous per se, unprivileged and malicious.

The United States Court of Appeals, in a two-to-one decision, reversed the judgment. Chief Judge Bazelon, writing for the court, accepted the defendant’s contention that the subject of the article was “the total relationship of whites and Negroes in America” and applied the District of Columbia version of the fair comment rule. This variation permits erroneous misstatements of fact about issues of public concern and protects the defendant unless the plaintiff succeeds in proving special damages, i.e., pecuniary loss. This rule differs from the United States Supreme Court’s rule in New York Times Co. v. Sullivan, which protects the defendant making such misstatements as long as the plaintiff does not prove “actual malice.” Chief Judge Bazelon said, without giving his reasons, that the Times v. Sullivan rule should not apply. He concluded that without the proof of special damages, a finding of actual malice or that the article was libelous per se is immaterial. In addition he stated that “the existence of a public interest question depends ‘upon the facts as they reasonably appear to the person whose liability is in question’.”

Judge Wright, concurring in the result, agreed that the plaintiff, a private citizen, had entered the public arena in his attempt to censor the newspaper and that the article therefore concerned a matter of legitimate public interest. However, Judge Wright applied the Times with biased whites as his steady clients.” Fair comment applied because plaintiff’s conduct was a matter of public concern.

3. Appellee-plaintiff’s petition for a rehearing en banc.

4. In addition, the editor wrote that the plaintiff told him “a story about the ignorance of one of his customers which he said illustrated the low level of intelligence of the people in the neighborhood near his drug store” — a neighborhood “where he, like a good many white people, refuses to live.” The article further stated that “if [the plaintiff] has that right [not to carry the Afro in his store], then, every colored man, woman, and child who lives anywhere near . . . [the plaintiff’s drug store] has a comparable right not to buy a single article in his store.” The full article appeared in the joint appendix of the Brief for Appellant.


holding and concluded that the plaintiff should not recover because there was no finding of actual malice.11

Dissenting, Judge Washington preferred the plaintiff's contention that the cancellation of a newspaper subscription by a neighborhood druggist was a private matter which was not of legitimate public interest and, therefore, not "an appropriate case for the application" of either the Times v. Sullivan doctrine or the District of Columbia fair comment rule. Also, he disagreed with Chief Judge Bazelon regarding who should decide "whether the subject matter of an article is of public concern."12 Judge Washington stated that the decision "is for the court to make de novo, not for the publisher of the alleged defamation."13

The issue of public interest is one of the elements of the broader defamation concept known as "fair comment." This defense14 gives the publisher, who may be anyone,15 a qualified privilege16 to comment on matters of public concern as long as the publication is communicated without malice and does not relate to the personal character of an individual, but only to his acts.17 Until 1964, about three-fourths of the states18 required a most significant third element: the privilege was limited to expressions of "opinion" based on facts generally known or truly asserted in the publication, thus allowing the reader to draw his own conclusions. The minority of jurisdictions19 permitted misstatements of fact, at least as to defamation of public officials, as long as there was an honest belief in their truth.20

13. Ibid. Judge Washington continued, "Under [one commentator's] view of the matter, it would seem that the privilege would protect libelous comment on the supposed bigotry of almost any person." The general view seems to be that "a misguided notion as to the defendant's moral obligation or justification to make the statement will not exonerate him. . . ." Prosser, TORTS § 110, at 820 (3d ed. 1964).
16. There was in the early days a theoretical dispute as to whether "fair comment" was a privilege or a right. If it is considered a right, then there is no defamation; whereas, if it is considered a privilege, there is a defamation but no liability, assuming the privilege is not abused. Today most authorities accept "fair comment" as a qualified privilege. See RESTATEMENT, TORTS § 606 (1939); 1 HARPER AND JAMES, TORTS § 5.28, at 457 (1956); and Boyer, Fair Comment, 15 OHIO ST. L.J. 280 (1954).
20. Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281, 292 (1908), is the leading case for the minority position. The Kansas court in support of its position stated: The liberal rule [adhered to here] offers no protection to the unscrupulous defamer and traducer of private character. The fulminations in many of the decisions about a Telemontian shield of privilege from beneath which scurrilous newspapers may hurl the javelins of false and malicious slander against private
In 1964, the Supreme Court of the United States in New York Times Co. v. Sullivan21 established the minority position as a constitutional guarantee under the first amendment and applied it to the states through the fourteenth amendment. The Court created "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."22 Justice Brennan, writing for the Court, reasoned, "[E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'."23 Besides this rationale, he suggested that "self-censorship" arises because critics are overly cautious for fear of not being able to prove the truth of their statements.24 Also, in Garrison v. Louisiana,25 Justice Brennan referred to Times v. Sullivan and declared:

Speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."26

In deciding Times, the Supreme Court balanced several interests. It gave some consideration to the argument that since public officials are given an absolute privilege for utterances made within the scope of their duties — at least to the extent that malice is wanting — our citizens should be given a corresponding privilege.27 But more important, it attempted to regulate the clash between our cherished interest...
in free expression, especially when it concerns individuals in their public functions, and over personal interest in reputation and privacy. 28 Judge — later Chief Justice — William Howard Taft declared some years ago:

The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. 29

It is the duty of the trier of facts to distinguish fair comment and unjustifiable defamation 30 in the context of these competing interests of public speech and personal privacy. As a measure for this balancing and distinguishing process, the Court provided the "actual malice" test 31 in its Times decision, thus qualifying the fair comment privilege. 32 It is notable that even this slight guideline was challenged


If the expression falls within the interest of the "public hearer," then it must be preferred over the less critical interest in integrity of personality. If this be a value judgment, it is one based on commonly shared values. This society could survive the abolition of the defamation action. If our mental well-being depended on it, rather than the common decency and civility of our fellow man, we would all be callous brutes or mental wrecks by now. Our society cannot tolerate, on the other hand, the slightest abridgement of political and social protests.


The Court in Garrison v. Louisiana, 379 U.S. 64, 75 (1964), quoting from Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), stated, "Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .'"


31. 376 U.S. at 280. The Court defined "actual malice" as "with knowledge that it was false or with reckless disregard of whether it was false or not." In Times v. Sullivan the New York Times failed to check its readily available files for the genuineness of the alleged defamatory advertisement, but instead relied on some of the prominent names listed in it, such as Eleanor Roosevelt. It appears that reckless disregard is more than mere negligence and must be proved with "convincing clarity." 376 U.S. at 285-86. Cf. Henry v. Collins, 380 U.S. 356 (1965).

32. Chief Judge Bazelon in the principal case, while recognizing the needed protection for private citizens who become embroiled in public controversy, concluded that a plaintiff is better protected by having the burden of proving special damages rather than actual malice. However, in Times v. Sullivan it is unlikely that the plaintiff could have proven special damages, as only 394 copies of the Times were distributed in Alabama. In addition, in the principal case, while Jaffe suffered no special damages since his pharmacy business did not decline, he and his family did suffer emotional distress. It is notable that the district court judge found "presumed malice" in the publishing of the article after weighing, among other evidence: (1) the editor's assertion and Jaffe's denial that he criticized the Negro race as having a low intelligence; (2) the statement that Jaffe refused to live in a colored neighborhood, which related to his private life and implied that he was willing to take Negroes' money but not to live among them; and (3) the statement suggesting that every colored person should not buy from his drug store. Today, the rule in the District of Columbia
by the concurring opinions in *Times*, where Justices Black, Douglas and Goldberg supported an absolute privilege, finding that actual malice "is an elusive, abstract concept, hard to prove and hard to disprove."³³

Before the trier of the facts can even begin this balancing, however, he must find that the subject matter of the allegedly libelous material is within the allowable range over which the privilege of fair comment extends. This is perhaps the most difficult determination of all, and the problems of such a delineation are well outlined in the principal case. The plaintiff in the present case contended that *Times* was limited to cases involving public officials, while the defendant argued that it applied to other individuals as well. The question was thus squarely raised, whether the holding in *Times v. Sullivan* should reach Jaffe, the plaintiff pharmacist, or be narrowly construed to concern only public officials. Otherwise stated, the question was, what was the extent of fair comment?

Prior to the *Times* decision, the fair comment doctrine had been applied in cases falling into two broad categories: (1) those cases involving comment about individuals who have submitted themselves to public attention by engaging in activities in the public arena; and (2) those cases involving discussion of topics or institutions of public concern.³⁴ Some recent decisions recognizing a public interest about individuals who by their conduct invited public comment or criticism concerned public officials,³⁵ associates of public officials,³⁶ candidates

should be in accord with *Times v. Sullivan* and not with the prior rule of special damages applied by Chief Judge Bazelon.

³³. 376 U.S. at 293, 302 n.4. In Garrison v. Louisiana, 379 U.S. 64, 81 (1964), Justice Douglas said malice is a "nebulous standard" which can be easily met. See Berney, *supra* note 28, at 25, who prefers the absolute privilege and states: "In particular it should be stressed that having an 'absolute privilege' does not necessarily result in granting more immunity; it is entirely possible, as a practical matter, to have greater freedom of expression where the privilege is conditioned on lack of malice." For example, that which constitutes a privileged statement of public interest might be restricted. See also Pedrick, *supra* note 27, at 596-97, who disapproves of the "absolutist" approach and yet says: "To attempt to define 'reckless disregard' is to attempt the impossible as anyone with a casual acquaintance with the automobile guest cases will confirm. Nevertheless, it is impossible that the approach taken in the *Times* decision may lull the press into a false sense of security."

³⁴. 376 U.S. at 283: "We hold that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct."


for public office, leaders of citizen groups, heads of secular and religious organizations, authors and publishers, radio announcers, athletes, teachers and coaches, and other newsworthy personalities.

As for the second category, recent decisions have dealt with statements about national security, law enforcement, public health, and the suffrage amendment. The court said, "His doings, his associates, the forces back of him, his support financial and otherwise in connection with the campaign, his going and his comings, all of these insofar as they might throw light upon the nature of the forces that were interesting themselves in such campaign were matters of legitimate public interest and concern. The communication was therefore privileged."

44. Julian v. American Business Consultants, Inc., 2 N.Y.2d 1, 137 N.E.2d 1 (1956), noted in 1956 U. Ill. L.F. 672. The court affirmed the dismissal of the plaintiff's action where his name was listed in a book in relation to Communist interests, saying, 137 N.E.2d at 7, "Those who demand the right of free speech as necessary to the successful pursuit of their profession, should not seek to deny the same right to their critics." In McCarthy v. Cincinnati Enquirer, 101 Ohio App. 297, 136 N.E.2d 393 (1956), where plaintiff, a radio broadcaster, attacked the fluoridation of water, the court held he submitted himself to criticism. But see State Press Co. v. Willett, 219 Ark. 830, 245 S.W.2d 403 (1952), where fair comment was inapplicable and the jury found actual malice.

45. Cepeda v. Cowles Magazines and Broadcasting, Inc., 328 F.2d 869 (9th Cir. 1964) (defense of fair comment was denied where reporter expressed no opinion, criticism, analysis or comment).

46. Hoepner v. Dunkirk Printing Co., 254 N.Y. 95, 172 N.E. 139 (1930) (fair comment permitted about teacher-coach and high school football team).

47. Brewer v. Hearst Publishing Co., 185 F.2d 846 (7th Cir. 1950) (plaintiff veterinarian was held to have invited criticism by supporting pending legislation approving of vivisection). But see Hogan v. New York Times Co., 313 F.2d 354 (2d Cir. 1963) (fair comment abused when defendant described policeman's conduct as a "Keystone Comedy only for purpose of amusing its readers"); and MacRae v. Afro-American Co., 172 F. Supp. 184, 188 (E.D. Pa. 1959) (wife of a university dean was not a public person).

48. Coleman v. Newark Morning Ledger Co., 29 N.J. 357, 149 A.2d 193, 206 (1959), where an investigation of the connections of the plaintiff, a radar scientist, with a convicted and executed atom spy was "substantially related to the national security and defense." See also Hartmann v. Boston Herald-Travelers Corp., 323 Mass. 56, 80 N.E.2d 16 (1948), where defendant criticized the "Peace Now" movement seeking immediate negotiation with Germany and Japan, a view which was squarely against the government's policy. The article reflected on the plaintiff, who was the chairman. The court stated, 80 N.E.2d at 19, "Fair comment may be severe and may include ridicule, sarcasm, and invective."


50. E.g., Mick v. American Dental Ass'n, 49 N.J. Super. 262, 139 A.2d 570 (1958) (plaintiff campaigned against fluoridation of drinking water, a subject which affects
education, labor policy and relations, laws of the state, plays and books, victimization, and other newsworthy or human interest topics. The scope of privileged comment about individuals is, of course, broader in the first category of cases. In both types of cases, however, the fair comment doctrine will not be applicable if the comment about the private character of the individual has no relevant relationship to the interest of the public. "[T]he mere fact that one is a public individual, [does not mean] he may be exposed to naked libel."

Since fair comment encompasses vast and varied notions of the public's interest, should the Times v. Sullivan decision, permitting misstatements of fact, be limited to cases involving "public officials?" In that case, the plaintiff was one of the three elected commissioners for the city of Montgomery, Alabama, and supervised the police department. One might argue that the Supreme Court, by constantly referring to "official" conduct, was distinguishing between the actions of public officials and private citizens in stating its holding. Also,

the health of the citizens. But see De Savitsch v. Patterson, 159 F.2d 15 (D.C. Cir. 1946) (article concerning an investigation of the plaintiff by the Health Department improperly extended into plaintiff's professional standing; defendant was not entitled to summary judgment).

51. Everett v. California Teachers Ass'n, 208 Cal. 2d 291, 25 Cal. Rptr. 120 (1962) (plaintiff was acting superintendent of school district and was allegedly libeled in a report issued by defendants concerning the schools).


54. Deroumain v. Stokes, 168 F.2d 305 (10th Cir. 1948); Brown v. New York Evening Journal, 143 Misc. 199, 255 N.Y.S. 403, 405 (Sup. Ct. 1932) (motion for dismissal of complaint was denied because privilege was possibly exceeded by using "false remarks attacking the character or professional integrity of the author").


57. In Times v. Sullivan, 376 U.S. at 301, Justice Goldberg stated, "This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen." He continued, at 302 n.4, "In most cases . . . there will be little difficulty in distinguishing defamatory speech relating to private conduct from that relating to official conduct. I recognize, of course, that there will be a gray area." See note 54 supra. See also De Savitsch v. Patterson, 159 F.2d 15 (D.C. Cir. 1946); Frosser, op. cit. supra note 15, § 110, at 815; 1 HARPER AND JAMES, op. cit. supra note 16, at 461; Boyer, supra note 16, at 290-91; and Thayer, supra note 35, at 304.


59. The court in Dempsey, supra note 58, at 188-89, in referring to Spahn v. Messner, Inc., 43 Misc. 2d 219, 224, 250 N.Y.S.2d 529, 535 (Sup. Ct. 1964), where the application of Times v. Sullivan was rejected, said that "the New York Times case . . . was limited to its specific facts, to wit, criticism of the official conduct of public officials. . . ." But see Rosenblatt v. Baer, 86 S. Ct. 669, 678 (1966), where Justice Douglas, concurring, noted that "if the term 'public official' were a constitutional term, we would be stuck with it and have to give it content. But the term is our own; and so long as we are fashioning a rule of free discussion of public issues I cannot relate it only to those who, by the Court's standard, are deemed to hold public office." In addition, Justice Black, dissenting, 86 S. Ct. at 680, stated, "The right to criticize a public agent engaged in public activities cannot safely, and should not, depend upon whether or not that agent is arbitrarily labeled a 'public official'."

60. See Note, 51 VA. L. Rev. 196, 213 (1965).
the concurring justices, in favoring an absolute privilege, perhaps did not intend to automatically extend this privilege to criticism of individuals other than public officials. In addition, Justice Brennan in Garrison v. Louisiana seemed to be using the terms "public-official rule" and "New York Times rule" synonymously.\(^6\)

In what seems to have become a famous footnote in Times v. Sullivan, the Supreme Court expressly stated that this was not the proper time for it "to determine how far down into the lower ranks of government employees the 'public official' designation"\(^6\) should extend. Shortly thereafter, in Garrison v. Louisiana, the court held that eight local judges were "public officials."\(^6\) During the present 1965-66 term of the Supreme Court, Justice Brennan, writing for the Court in Rosenblatt v. Baer\(^4\) stated, "It is clear . . . that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."\(^6\) Recently the United States Court of Appeals for the Fifth Circuit,\(^6\) over a vigorous dissent, affirmed a district court decision\(^6\) which denied the extension of the "public official" category to the Director of Athletics at the University of Georgia, a state institution, who under Georgia law was considered merely an agent of the University's Athletic Department. However, in Gilligan v. King\(^6\) an off-duty policeman, who shot and killed a fifteen year old boy in self-defense, was held to come under the Times v. Sullivan "public official" designation.

The court in Gilligan may have viewed the plaintiff's shooting of the youth under what might be labeled the "spotlight" test, i.e., the plaintiff performed some act bringing him into the public arena. This "spotlight" approach was expressed in Walker v. Courier-Journal and Louisville Times Co.\(^9\) Major General Walker, who commanded the

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\(^{61}\) See 379 U.S. 64, at 77 (1964).
\(^{62}\) 376 U.S. at 283 n.23.
\(^{64}\) 86 S. Ct. 669 (1966). In this case the court reversed a judgment for the plaintiff, the past supervisor of a county recreation area, and remanded the case to the New Hampshire Supreme Court to decide whether the plaintiff was a public official and, if so, whether actual malice existed.
\(^{65}\) Id. at 676. See Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965), where Times v. Sullivan was held not to be limited to elected public officials, and therefore the decision applied to the plaintiff, a deputy chief of detectives and lieutenant of police. See also Fignole v. Curtis Publishing Co., 247 F. Supp. 595, 597 (S.D.N.Y. 1965), which stated that the rule of Times v. Sullivan has not been applied to public officials in foreign countries. In addition, see Pearson v. Fairbanks Publishing Co., 33 U.S.L.W. Week 2307 (Alas. Super. Ct., Dec. 22, 1964), which extended Times v. Sullivan to "public figures of international stature" who publicly support public officials.
\(^{66}\) Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965).
\(^{68}\) 264 N.Y.2d 309 (Sup. Ct. 1965). The court denied a motion for dismissal in order to deny the jury to decide whether there was "actual malice." But see Tucker v. Kilgore, 388 S.W.2d 112 (Cl. App. Ky. 1965), where the court considered the fact that the plaintiff was a policeman merely coincidental.
\(^{69}\) 246 F. Supp. 231 (D. Ky. 1965). A case arising out of the same subject matter was Associated Press v. Walker, 393 S.W.2d 671 (Tex. 1965), where the Texas court completely ignored Times v. Sullivan and affirmed a jury verdict for the plaintiff.
soldiers during the school integration riots in Little Rock, Arkansas, was a candidate for governor of Texas and was generally known to the public. He announced on radio and television that he would be at the student riots occurring at the University of Mississippi in Oxford. The Associated Press reported that Walker assumed command of the students rioters and led them against the federal marshals. This report, which the plaintiff contends was false, was received by the Courier-Journal from news gathering services. Federal District Judge Gordon, dismissing the complaint and holding that the Times v. Sullivan rule was applicable, stated:

[T]he spirit of the Times Opinion [is a] “... profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open. ...” Public debate cannot be “uninhibited, robust and wide open” if the news media are compelled to stand legally in awe of error in reporting the words and actions of persons of national prominence and influence (not “public officials”) who are nevertheless voluntarily injecting themselves into matters of grave public concern attempting thereby through use of their leadership and influence, to mold public thought and opinion to their own way of thinking. If any person seeks the “spotlight” of the stage of public prominence then he must be prepared to accept the errors of the searching beams of the glow thereof, for only in such rays can the public know what role he plays on the stage of public concern — often, regretfully, a stage torn in the turmoil of riot and civil disorder, whereon error in reported occurrence is more apt to become the rule rather than the exception.

on the grounds that the defendant failed to convince the jury of the truth of the facts and that fair comment is not applicable where there are misstatements of fact. It seems improper that the Texas court never once referred to the Times decision, at least in an attempt to distinguish it from their case. Instead, it discussed the law as though the Supreme Court had never considered the privilege of fair comment. The verdict was for $500,000.00.

In New York Times Co. v. Sullivan, 376 U.S. 254, at 294-95 (1964), Justice Black, in referring to this half-million-dollar verdict against the Times, desired to hold for the defendant because of the threatened financial ruin for the Times and other news media discussing civil rights and other fields where the juries find the views unpopular. See 78 Harv. L. Rev. 204 (1964). See also Berney, supra note 28, at 34 n.175, which states:

The “muck-rakers” and “scandal sheets” have achieved a kind of functional immunity under the law, first because respectable people prefer not to accord such publications even the recognition that a libel action affords. To sue such a publication is to recognize that it is capable of causing loss of esteem in a segment of the community that matters. Second, such outfits are adept at maintaining an impecunious condition, whether real or feigned.

70. Id. at 233-34. Plaintiff “identifies himself in his own Complaint, [as] a person of ‘political prominence.’” The court took judicial notice of his public character.

71. Walker v. Courier-Journal & Louisville Times Co., 246 F. Supp. 231, 234 (D. Ky. 1965). In support of this theory Judge Gordon quoted part of footnote 23 of the Supreme Court’s opinion: “We have no occasion here ... to specify categories of persons who would or would not be included [within the holding of the case].” 246 F. Supp. at 233, quoting from 376 U.S. at 283 n.23. He stated:

From this language I believe the Supreme Court of the United States has served clear notice that the broad Constitutional protections afforded by the First
Judge Gordon reached "the inescapable conclusion" that \textit{Times v. Sullivan} is "applicable to a 'public man'" as well as a "public official" and that "Walker was such a 'public man'"\textsuperscript{72} who voluntarily stepped into the spotlight. This so-called "spotlight" test does not necessarily have to extend only to "public men," i.e., those who have already attained prominence. Therefore, it might have been argued in \textit{Gilligan}, although the court did not do so, that the plaintiff policeman stepped into the limelight of public attention by shooting the fifteen year old boy. However, a counterargument would be that the plaintiff involuntarily entered the public arena.

Another case which would fall within the \textit{Times} rule using the "spotlight" test is \textit{Pauling v. News Syndicate Co.}\textsuperscript{73} Dr. Linus Pauling, a Nobel Prize winner and biochemist, is a very active pacifist and endeavored to stop the resumption of atmospheric nuclear testing by the Soviet Union. He sent a letter and a telegram to Premier Krushchev and suggested to President Kennedy that the United States refrain from resuming its testing. The defendant, in its article, expressed among other things that it was good to have Dr. Pauling "on the American side for once." A jury verdict for the defendant, obtained under pre-\textit{Times} law and resulting in a dismissal of Dr. Pauling's complaint, was affirmed by the United States Court of Appeals. By connecting himself publicly with President Kennedy and Premier Krushchev, Dr. Pauling voluntarily stepped into the public spotlight. The court in looking at \textit{Times v. Sullivan} said:

> Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; . . . . Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line. . . .\textsuperscript{74}

and Fourteenth Amendments will not be limited to "public officials" only, for to have any meaning the protections must be extended to other categories of individuals or persons involved in the area of public debate or who have become involved in matters of public concern. If the Supreme Court intended to limit its holdings to "public officials" only, \textit{then why Footnote 23}?

However, it seems he did not go far enough, for the Supreme Court in \textit{Garrison v. Louisiana}, 379 U.S. at 72 n.8, stated: "We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore, nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discrete area of purely private libels." Thus, it becomes apparent that the Court in \textit{Times v. Sullivan} decided only the case before it and expressed no opinion as to the extent of the "public official" designation, therefore giving no hints to the courts when faced with plaintiffs other than public officials. See Clark v. Pearson, 248 F. Supp. 188, 193-94 (D.D.C. 1965), which emphasized that the \textit{Times v. Sullivan} rule is "limited to high-ranking Government officials." See also \textit{Prosser, op. cit. supra} note 15, § 110, at 815, which states that "\textit{[Times v. Sullivan]} apparently provides no clue as to whether [the Court's ruling on misstating of facts] is to be true of comment on other matters of public concern" besides the conduct of public officials.

\textsuperscript{72} Id. at 233.
\textsuperscript{74} \textit{Id.} at 671 (emphasis added). In support of this view, see Pauling v. National Review, Inc., 34 U.S.L. \textit{Week} 2575 (April 21, 1966). See also Kalven, \textit{supra} note 24,
Arguably, the *Times* doctrine may be further extended to include comments about individuals involuntarily thrust into debates over issues of public concern. It is notable that the Supreme Court in *Times* quoted from *Coleman v. MacLennan* that, "this privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office." The Court further stated, "The present advertisement, as an expression of grievance and protest on one of the major public issues of our times, would seem clearly to qualify for the constitutional protection." Also, Justice Goldberg, concurring, said, "[O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it."

In *Gilligan v. King*, the plaintiff off-duty policeman may have become ensnared in the public debate over the desire to establish a civilian review board, one of its main concerns being the recommendation that off-duty policemen not be permitted to carry guns. Thus, the *Times* rule would be applied to this case under the "public issue" approach. In *Gilberg v. Goffi*, the defendant, who was a candidate for alderman, in presenting the issues aimed at his incumbent rivals remarked that the city needed a code of ethics to govern the conflict-of-interest problem of the mayor's law firm, of which the plaintiff was a partner. Although the Supreme Court of New York, in reversing a denial of defendant's motion for summary judgment, did not specify any test for its decision, the court did balance the interests in favor of free debate on questions of public concern. The court also noted that plaintiff voluntarily entered "the fray as champion of the law firm," thereby stepping into the spotlight. In addition, the court thought it to be an anomaly to preclude the mayor from suing under
Times v. Sullivan, but to allow his law partner to do so on the same subject-matter.82

In the present case, Afro-American Publishing Co. v. Jaffe, the principal questions were whether the plaintiff druggist voluntarily entered the spotlight or whether there was an issue of grave public concern. The plaintiff argued that he did not take any public stand nor invite any public controversy and that Times v. Sullivan is limited to cases involving public officials. Jaffe expressed his views only after refusing to do so during a telephone conversation and after being pursued further by the editor during an unwelcomed visit at his pharmacy. It is very difficult to draw any analogy between Mr. Jaffe and Dr. Pauling or General Walker, who were "public men" voluntarily stepping into the spotlight.

As for the public issue question, the defendant argued that its article, in commenting on Jaffe's opinion about the civil rights movement and his conspicuous manner of cancelling the Afro subscription, which was as inconspicuous as possible, dealt with what Chief Judge Bazelon called "the total relationship of whites and Negroes in America."83 The subject matter of defendant's article was the cancellation by a small local druggist of a subscription to sell thirty copies of a newspaper twice a week — a purely private matter which became public only through the defendant's defamation. This would hardly qualify as an issue of grave public concern.*

82. 251 N.Y.S.2d at 831. See H. O. Merren & Co. v. A. H. Belo Corp., 228 F. Supp. 515 (N.D. Tex. 1964), where the court held that an article about a legal loophole letting goods flow from the United States to Cuba, which did not mention the plaintiff shipper, was a matter of public concern. See also Curtis Publishing Co. v. Butts, 351 F.2d 702, 722 (5th Cir. 1965), where the dissenting judge discussed the public issue of "the education of the youth who attended The University of Georgia — a public institution" and then concluded that the plaintiff was a public official, seeming to fit the case under Times v. Sullivan.

83. The defendant contended also that Times v. Sullivan does not apply only to public officials. But even if this were so, the plaintiff could probably have satisfied the requirement of actual malice. If the Afro only wanted to discuss the racial relations problem, they could have left out of the paper a picture, on the front page, of the plaintiff's drug store with a reference to "One Man's War Against the Afro." In addition, the defendant did not have to mention the plaintiff's name and in the middle of the article place the word "Jewish" in a bold face heading. In support of this argument, about four months prior to this incident, the plaintiff complained about the newspaper's headlines to the editor, who then wrote an article that a "local store proprietor" thought the paper was stirring up hatred. There seems to be little excuse for the defendant's not using a similar overtone for the article in question. Thus, it seems that any extension of the Times v. Sullivan holding should not reach so far as to include Mr. Jaffe.

* Editor's Note. This case has been reheard by the United States Court of Appeals for the District of Columbia sitting en banc. A decision should shortly be forthcoming.